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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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DATE: DEC 12 2011 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Michigan corporation that previously filed a petition on behalf of the beneficiary in order to employ her as its chief executive officer. The petitioner has filed another nonimmigrant petition on behalf of the beneficiary in order to extend her employment as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel disputes the director's decision and indicates that a brief and/or additional evidence will be forthcoming within 30 days of the appeal. To date, however, there is no indication that the record has been supplemented in any way. Therefore, the record will be considered complete as presently constituted and a decision will be made based on the documents that have been submitted thus far.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an addendum to the Form I-129, the petitioner provided the following list of the beneficiary's proposed job responsibilities in the United States:

- Plan, direct, and coordinate the start[-]up of U.S. operations;
- Direct and coordinate [the petitioner]'s financial and budget activities to fund operations, maximize investments, and increase efficiency;

- Conduct initial market research; Develop and implement product marketing strategies including advertising campaigns and sales promotions, and promote [the petitioner]'s products to the leather apparel community;

- Determine staffing requirements and interview hire, and train at least one (1) Operations Manager, (1) Sales Manager, at least (2) sales associates; oversee those personnel processes;

- Promote [the petitioner]'s leather products by way of placing print advertising, purchasing mailing lists, and organizing introductory seminars for local wholesalers;

- Monitor general operations to ensure that they efficiently and effectively provide clients with ordered products while staying within budgetary limits;

- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement;

Additionally, the petitioner provided a copy of its organizational chart reflecting its organizational structure for the 2008-2009 time period. The chart shows the company's director at the top of the hierarchy followed by the beneficiary in the position of president, treasurer, and secretary. The chart shows that the beneficiary's subordinates included a vice president/marketing executive. It is noted that the petitioner claimed only two employees at Part 5, Item 11 of the Form I-129. It is therefore unlikely that the organizational chart for 2008-2009, identifying a total of three employees, can be deemed as an accurate depiction of the petitioner's organizational hierarchy as of January 2010 when the Form I-129 was filed.

While the AAO also acknowledges the petitioner's submission of a statement containing a handwritten date of March 12, 2008 in which the beneficiary, in her capacity as president of the petitioning entity, discussed her responsibilities with the U.S. entity, the Form I-129, whose merits will be addressed in the instant proceeding, was filed in January of 2010, nearly two years after the beneficiary's statement. As such, the probative value of the information provided in the 2008 statement, if any, has not been established.

The remainder of the supporting documents that the petitioner submitted with the Form I-129 included a copy of a lease with a lease term that expired on November 30, 2008, the petitioner's 2007 corporate tax return, the petitioner's sales invoices for various months in 2007 and 2008, and a copy of a specialty license agreement executed on November 11, 2009 identifying the beneficiary as the licensee doing business as "Head 2 Toe."

On February 5, 2010, the director issued a request for evidence (RFE) instructing the petitioner to provide an organizational chart illustrating the petitioner's managerial hierarchy and staffing levels, as well as a more detailed description of the beneficiary's job duties with the U.S. entity accompanied by an estimate of the percentage of time the beneficiary would allocate to each listed job duty. In the supplemental job description, the petitioner was asked to indicate the job titles and position descriptions of any employees the beneficiary directly oversees. Additionally, the director asked the petitioner to provide quarterly wage reports for the last eight quarters before the date of the RFE.

In response, the beneficiary provided a statement dated March 14, 2010 in which she stated that she is responsible for managing the business in the United States. She also stated that she introduces the company

and its products to distributors and retailers, signs contracts, places orders, receives and issues payments, maintains bank accounts, attends shows and business conferences, searches for suppliers of calf hides for export to India, negotiates prices, and collects materials samples. The beneficiary indicated that 60-70% of her time would be allocated to the job duties listed above. Next, the beneficiary stated that she updates the company director about business activities and discusses future plans and business promotions. The beneficiary stated that she headed the purchase of an additional retail store in November 2009 and appointed two additional sales employees. Lastly, the beneficiary stated that she oversees the work of a marketing executive who works in India and claimed that 30-40% of her time is spent directing this individual, including instructing him to check and place orders and to approve merchandise for purchase from suppliers, discussing with him the terms and conditions of prices and payments, and directing him to execute orders after consulting with the company director.

The petitioner also provided a number of its quarterly wage reports showing that it had two employees, including the beneficiary, during the fourth quarter of 2009. Lastly, the petitioner included a copy of its organizational chart reflecting its staffing as of March 15, 2010. The chart shows the company director as the beneficiary's direct superior and a vice president/marketing executive and two sales people as the beneficiary's direct subordinates.

On April 7, 2010 the director issued a decision denying the petitioner's Form I-129, concluding that the petitioner failed to establish that the beneficiary has been or would be employed in the United States in a qualifying managerial or executive capacity. The director referred to the job description dated March 12, 2008 and determined that the job duties listed therein were non-qualifying and were more akin to tasks that are required to provide a service or produce a product. The director also observed that the evidence submitted indicates that the beneficiary and one part-time sales person are the petitioner's only two employees, as no evidence was provided to show that the petitioner paid wages or a salary to [redacted] who the petitioner claims is a commission-based employee. Lastly, the director rejected the petitioner's claim that the beneficiary manages the work of [redacted], a marketing executive shown to be working in India. The director explained that the beneficiary's employment capacity must be based on the job duties she performs for the U.S. entity and because the marketing executive is not employed by the U.S. entity the beneficiary's oversight of this individual cannot be considered as part of her proposed employment.

On appeal, counsel asserts that the director's decision is erroneous, pointing that that since one of the petitioner's employees is paid on a commission basis, his name is not included in any of the petitioner's quarterly wage reports or payrolls. Counsel also provides an account of the petitioner's business locations, stating that the petitioner has moved several times, and claims that the petitioner has been in the process of opening a second store front, which was projected to be operational as of June 2010.

The AAO finds that counsel's arguments are not persuasive in overcoming the ground cited as the basis for denial.

First, with regard to the petitioner's opening of a second store front, eligibility must be established based on the facts and circumstances that exist at the time the petition is filed. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As such, the petitioner's plans to expand its business by opening a second store location in June of 2010 would be irrelevant for the purpose of establishing eligibility

in the present matter which involves a petition that was filed in January of 2010— five months prior to the projected opening of a second store location.

Second, merely claiming that one of the petitioner's employees is remunerated a wage on a commission basis does not relieve the petitioner from the burden of substantiating its claims with reliable supporting evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record as presently constituted indicates that the petitioner was staffed with no more than two employees at the time the petition was filed— the beneficiary and one part-time sales person. While the AAO will not make its determination based only on the petitioner's staffing composition, this factor is a relevant consideration, as it provides the AAO insight as to the petitioner's overall capability to relieve the beneficiary from having to devote her time primarily to the performance of non-qualifying tasks. It is reasonable to assume that a company with a limited support staff is less likely to have the ability to relieve the beneficiary from having to primarily perform those tasks that are outside the realm of what is deemed to be a qualifying managerial or executive capacity.

Here, the petitioner operates a retail outlet, which at the time of filing appears to have been staffed with the beneficiary as its only full-time employee assisted by one part-time employee whose hours have not been established by the submitted evidence. The petitioner has provided no credible explanation to establish how it can operate with such a limited support staff if the beneficiary were to focus the primary portion of her time to tasks within a qualifying managerial or executive capacity.

Another factor that must be considered in determining the beneficiary's employment capacity is the petitioner's description of the beneficiary's proposed job duties. Published case law supports U.S. Citizenship and Immigration Services' (USCIS) reliance on the beneficiary's actual duties as an accurate indicator of the true nature of the proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

While the AAO finds that the beneficiary's March 12, 2008 statement lacks probative value because it predates the petition by approximately two years, the information provided in response to the RFE contains sufficient information to allow the AAO to conclude that the primary portion of the beneficiary's time at the time of filing was being allocated to the performance of the petitioner's daily operational tasks, including promotion of the company's products before distributors and retailers, placing orders, balancing the petitioner's bank accounts, attending trade shows, searching for suppliers, and negotiating prices. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

After fully considering the facts and evidence presented in the petitioner's record, the AAO finds that at the time of filing the petition the petitioner generally lacked the organizational complexity which would enable the beneficiary to be employed in a qualifying managerial or executive capacity. Rather, the lack of an adequate support staff strongly indicates that the beneficiary has and would continue to carry out the

petitioner's operational tasks as a necessary means to continue doing business. The petitioner's overall needs do not supersede the statutory requirements which mandate that in order to be deemed an intracompany transferee the primary portion of the beneficiary's time must be allocated to tasks within a qualifying capacity. Here, neither the petitioner's staffing nor the job description attributed to the beneficiary's proposed employment indicate that the petitioner was ready and able to relieve the beneficiary from primarily performing non-qualifying tasks and employing her in a primarily managerial or executive capacity. In light of the grave deficiencies presented herein, the AAO finds that the director was correct in denying the petition to further extend the beneficiary's period of employment in the United States.

Additionally, while not previously addressed in the director's decision, the AAO finds that the record lacks evidence to show that the petition meets other filing requirements that were cited above at 8 C.F.R. § 214.2(l)(3). Namely, the petitioner failed to establish that the beneficiary was employed abroad for the requisite time period in a qualifying capacity or that the petitioner has a qualifying relationship with the beneficiary's foreign employer.[1]

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, on the basis of the additional grounds cited in the above paragraph, the instant petition cannot be approved.

As a final note, service records show the petitioner's previously approved L-1 employment of the beneficiary. Despite the prior approvals, the AAO finds that the current decision upholding the denial of the petitioner's latest Form I-129 was justified based on the above findings. For the purpose of clarification, the AAO notes that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary.

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that USCIS or any agency must

[1] The AAO notes that the petitioner failed to properly respond to the query at Part 5, Item 8, which asks for the beneficiary's intended dates of employment. In response to this question, the petitioner indicated that it intends to employ the beneficiary from August 1, 2008 through July 31, 2010. However, the record shows that the petitioner previously filed a Form I-129 seeking to employ the beneficiary during this same time period and that petition was approved. The petitioner did not indicate the intended period of employment it is currently seeking in its most recently filed Form I-129. As the instant petition will not be approved, the issue of the beneficiary's intended period of employment is not material in this proceeding and need not be further addressed.

treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.